In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 169

E. V. TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

I. C. TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the District Court denying the motion for a new trial (R. 94-95)[1] is not reported. The

[1] References to the printed record are designated "R" to indicate "Appendix to Appellants' Brief" and "Supp. R." to indicate "Appendices for the Appellee". References to the typewritten record consisting of four volumes of testimony at the trial and one additional transcript of a supplemental hearing on November 12, 1954, are indicated "Tr." and "Supp. Tr." respectively.

opinion of the Court of Appeals (Pet. 25-37) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. 37) was entered on May 23, 1955. The petition for certiorari was filed on June 20, 1955. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether evidence obtained from petitioners' records should have been excluded on the ground that the records were not voluntarily submitted to the Treasury agents.

2. Whether petitioners were deprived of a fair trial because during the first day of trial one of the jurors had a brief conversation with one of the prosecutors (with whom he was acquainted) about a matter unrelated to the case.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner

to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of the prosecution.

* * * *

(26 U.S.C. 1952 ed., Sec. 145.)

STATEMENT

On March 9, 1953, the grand jury for the Middle District of North Carolina returned a five-count indictment against E. V. Turner and another five-count indictment against I. C. Turner, charging each with wilful attempts to evade and defeat a large part of his own and his wife's [2] income taxes for the years 1946 to 1950, inclusive, by filing returns fraudulently understating the amounts of their income, in violation of Section 145(b) of the Internal Revenue Code of 1939. The two cases were consolidated and on October 15, 1954, after a jury trial lasting ten days (Tr. 2, 1283), petitioners were found guilty as charged. (R. 79.) On November 12, 1954, the trial court denied a motion for a new trial and sentenced E. V. Turner to two years and I. C. Turner to one year and one day in a reformatory. (R. 80). The Court of Appeals affirmed. (Pet. 25-37.)

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[2] Joint returns were filed by E. V. Turner for the years 1947 to 1950, and by I. C. Turner for the years 1948 to 1950. (Tr. 8, 10.)

The evidence adduced at the trial and at the hearing on the motion for a new trial may be summarized as follows:

During the years 1946 to 1950, petitioners, who were ~~brokers~~ brothers and equal partners, carried on the business of designing, fabricating and erecting outdoor advertising signs under the name of Turner Sign Company. On July 9, 1951, Daniel S. Forbes went to the main office of Turner Sign Company, identified himself to petitioners by showing them his credentials which indicated him to be a Special Agent of the Bureau of Internal Revenue, and told them that their individual income tax returns and the Turner Sign Company partnership returns had been assigned to him for examination. After a preliminary discussion E. V. Turner summoned the bookkeeper, H. B. Elliott, and told him to produce the books and records for Forbes to examine. Thereafter petitioners left. Elliott identified for Forbes the books and records, including work orders located in the plant office. Forbes studied the books and records in Elliott's office and then went to the plant office and secured 35 to 40 work orders for the year 1950. By comparing work orders and sales invoices with the books and records he found many items which were not recorded. (R. 2-8.)

Over a period of months, Forbes and his successor, Acting Special Agent Ray V. Williams, traced a substantial amount of unreported income to the

partnership's receipt of barter such as automobiles and electrical appliances. (Tr. 62-63, 105, 229-230, 451-452, 456, 458-459, 477-479, 497-500.) They also found recorded sales which were not reported (Tr. 84, 488), a $4,985.50 sale recorded as a loan (Tr. 101-102, 1059) after the proceeds had been converted into a cashier's check (Tr. 327-334, 714-715), deductions from recorded income made without explanation (Tr. 94-97, 1025), partners' withdrawals not recorded when made (Supp. R. 36-40; Tr. 1036-1040) and personal expenditures taken as business deductions (Tr. 142-145).

Two weeks after the investigation started Elliott produced a set of invoices for the years 1948, 1949 and 1950, grouped by months and explained to Forbes that these were the invoices he should be using and that the others were the wrong invoices. Forbes found that the new lot of invoices corresponded with the books, but they did not account for any of the unrecorded sales. (Tr. 41, 42, 44-47.) One morning Williams noticed Elliott putting into the waste basket some correspondence which upon examination (made with Elliott's permission) he found to include many references to sales which were neither recorded on the books nor otherwise evidenced by sales invoices or work orders. (R. 14-15.)

At the trial the Government proved item by item unrecorded sales for each of the years involved. Proof of the deficiency required the testimony of one hundred and twenty-nine witnesses. The addi-

tional partnership income and the income tax deficiencies of the partners (Supp. R. 20-24, 27-35) are shown in the following table:

Year	*Additional Partnership Income*	*Income Tax Deficiencies*	
		E. V. Turner	*I. C. Turner*
1946	$ 24,967.87	$ 3,672.43	$ 4,030.09
1947	44,016.01	8,255.94	8,519.29
1948	32,478.01	4,860.40	4,741.58
1949	38,620.41	5,158.50	5,071.14
1950	23,287.62	2,800.50	2,381.26
	$163,369.92	$24,747.77	$24,743.36

The defense did not attempt to disprove any of the unrecorded sales constituting the additional partnership income.

Four weeks after petitioners were found guilty, the trial judge heard testimony on a motion for a new trial based upon alleged contacts between Assistant United States Attorney E. L. Gavin, Jr., who participated in the prosecution, and Lonnie Buchanan, one of the jurors in the case. Buchanan had served as a juror during the criminal term of court in June and was called back in October of the same year as a member of the panel from which the jury in this case was chosen. Both of the men lived in Sanford, which is 58 miles from Greensboro where the trial was held. Buchanan, an elderly man, had delivered ice to Gavin's family when Gavin was a child and Gavin had gone to school with Buchanan's daughter. During the prior June Term, Gavin gave Buchanan a ride in his car on one or two occasions in going to or from court. Just before the Turner trial began, Buchanan's

daughter-in-law requested Gavin to take Buchanan to court on the opening day and Gavin did so. During the ride Buchanan asked what sort of cases were going to be tried and Gavin replied "income tax cases and I don't know what else." During the selection of the jury Buchanan was called to the jury box, and at that time asked the judge to excuse him because he was 72 years of age, had served in June, and had a sick brother. Gavin rose and called the court's attention to the prospective juror's age and to the fact that he had served in June. However, the judge refused to excuse Buchanan and he was sworn as a member of the jury. In the afternoon of the same day Buchanan asked Gavin to drive him home but Gavin replied that he was not going home. This conversation was reported to the court by Gavin who asked the judge to instruct the jury again "not to talk to anybody," and the judge did so. (R. 88-91.) Juror J. W. Honeycutt testified that Lonnie Buchanan told him that he rode with Gavin the "first week" of the trial. (R. 93.) Gavin testified that this occurred only on the morning of the first day of the trial and that he had no further contact with Buchanan during the two weeks of the trial. (R. 91.) Gavin had come to court prepared to stay in Greensboro during the trial and did not go home during the trial except for one night for a change of clothing. (R. 89, 93; Supp. Tr. 21.) The motion for a new trial was denied. (R. 94-95; Supp. Tr. 22.)

ARGUMENT

1. Petitioners contend (Pet. 14-17) that the evidence obtained from their records by the Treasury agents should not have been admitted because (1) petitioners were not warned of possible criminal prosecution, and (2) the agents' investigation was conducted under the guise of a routine examination for civil tax purposes. The contention is without merit.

It is well settled that failure to warn a potential defendant of his privilege against self-incrimination does not bar the admission of evidence obtained from him. *Powers* v. *United States,* 223 U.S. 303; *Wilson* v. *United States,* 162 U.S. 613. This rule clearly applies to income tax evasion cases. *United States* v. *Burdick,* 214 F. 2d 768, 773 (C.A. 3d), remanded, 348 U.S. 905, reaffirmed, 221 F. 2d 932, now pending on petition for a writ of certiorari, No. 168, O. T. 1955; *Montgomery* v. *United States,* 203 F. 2d 887, 892 (C.A. 5th); *Hanson* v. *United States,* 186 F. 2d 61, 64-66 (C.A. 8th); *Lisansky* v. *United States,* 31 F. 2d 846, 851 (C.A. 4th), certiorari denied, 279 U.S. 873; *Scanlon* v. *United States,* (C.A. 1st), decided June 13, 1955 (1955 P-H, par. 72,772).

The contention that the agents deceived petitioners by gaining access to their records on the pretense that their only purpose was the determination of the correct tax liability for civil assessment purposes, finds no support in the record.

There is nothing in the factual situation surrounding the permission granted to the agents to examine petitioners' books (*supra*, pp. 4, 5) which warrants such an inference. It is plain that petitioners voluntarily gave the agents access to their books and records, and there was present no fraud or deceit to vitiate their consent. Petitioner E. V. Turner testified (Tr. 1115) that he had never refused to cooperate with the agents but had given them access to the whole place. The Court of Appeals was clearly correct in concluding (Pet. 30) that "The agents made no investigation to which the defendants did not consent", and that (Pet. 31) "At no time did the agents bring pressure to bear upon the defendants or conceal their identity or practice any deceit." The case of *Gouled* v. *United States*, 255 U.S. 298, relied upon by petitioners, is clearly distinguishable, for it involved an entry gained under false pretenses and the seizure of documents without warrant or consent.

2. Petitioners contend (Pet. 17-21) that they were deprived of a fair trial because one of the prosecutors (Gavin), who was acquainted with one of the jurors who lived in his home town 58 miles from Greensboro (where the case was tried), transported him to or from Greensboro on at least three occasions before the trial began, and was approached by the juror during the afternoon of the first day of the trial with the question as to whether he would drive him home that night. As

shown in the Statement (*supra,* pp. 6-7), Gavin demurred, had no further contact with the juror during the remainder of the trial, and immediately mentioned the incident to the trial judge with the suggestion that the judge again instruct the jury "not to talk to anybody." After taking testimony concerning the pertinent facts of the matter (on petitioners' motion for new trial) the court stated its confidence that Gavin "would not be guilty of any improper conduct with a jury" and denied the motion. (R. 94.) Petitioners' only exception to the ruling (Supp. Tr. 21-22) seems to have been based on the alleged insufficiency of evidence to show the guilt of petitioner I. C. Turner.

The mere fact that Gavin was acquainted with the juror would not, of course, afford ground for challenging the juror's right to sit on the case (*Carpenter* v. *United States,* 100 F. 2d 716, 717 (C.A. D.C.); *Billington* v. *United States,* 15 F. 2d 359 (C.A. 6th)). Petitioners assert, however (Pet. 18, 21), that the contact between Gavin and the juror during the trial raised a presumption of prejudice, and that the holding of the Court of Appeals is in conflict with *Remmer* v. *United States,* 347 U.S. 227; *Wheaton* v. *United States,* 133 F. 2d 522 (C.A. 8th); *Stone* v. *United States,* 113 F. 2d 70 (C.A. 6th); and *Ryan* v. *United States,* 191 F. 2d 779 (C.A. D.C.), certiorari denied *sub nom. Duncan* v. *United States,* 342 U.S. 928. The first three cases are clearly distinguishable because they involved contacts or conversations with the jury or juror

during the trials on matters relative to the case in progress, whereas here the only contact during the trial was the juror's question to Gavin as to whether he could ride home with him that night, and Gavin's negative reply. The *Ryan* case, *supra,* far from supporting petitioners' contention, holds that even where a juror has a private conversation with the prosecutor on a matter relating to the case, the presumption of prejudice can be overcome by affirmative evidence. In affirming the conviction, the court stated (191 F. 2d at 782):

> The prosecuting attorney made no report of this conversation to the court and did not advise defense counsel. Clearly he should have done both. Nevertheless, as with the other conversations, the question in the end is whether the trial judge acted within the permissible area of discretion in not setting aside the conviction because of this occurrence.

The dispositive answer to petitioners' argument is that the trial court heard the evidence and found that there was no impropriety and no prejudice. Even assuming that the contact shown here was sufficient to raise a presumption of prejudice, the trial judge's holding was a matter within his discretion and is reviewable only for abuse of discretion. *Wheaton* v. *United States, supra,* p. 527; *United States* v. *Sorcey,* 151 F. 2d 899, 903 (C.A. 7th), certiorari denied, 327 U.S. 794; *Ryan* v. *United States, supra.* Clearly, there was no abuse of discretion here.

CONCLUSION

The decision of the court below is clearly correct, there is no conflict of decisions, and further review is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY, 1955.

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